

VU Research Portal

Unborn and Future Children as New Legal Subjects: An Evaluation of Two Subject-Oriented Approaches—The Subject of Rights and the Subject of Interests

ten Haaf, L.

published in

German Law Journal
2017

document version

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

citation for published version (APA)

ten Haaf, L. (2017). Unborn and Future Children as New Legal Subjects: An Evaluation of Two Subject-Oriented Approaches—The Subject of Rights and the Subject of Interests. *German Law Journal*, 18(05), 1091-1120.
https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/59a9a6d32994ca2e6f90b028/1504290517737/03+Vol_18_No_05_tenHaaf.pdf

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

Unborn and Future Children as New Legal Subjects: An Evaluation of Two Subject-Oriented Approaches—The Subject of Rights and the Subject of Interests

*By Lisette ten Haaf**

Abstract

The desire to prevent prenatal and preconceptional harm has led to a call for more legal protection for unborn and future children. This Article analyzes the way in which the Dutch legal system has responded to this call by identifying and critically scrutinizing two strategies employed in this response. First, to protect the unborn child from maternal harm, the concept of legal personality has been expanded to include the unborn child, albeit only the viable fetus. This strategy is criticized because its measures are presented as if they follow directly from the existing legal framework, whereas these measures are in fact based on several obscured assumptions and, therefore, bring to bear a new perspective on the concept of legal personality. The second strategy is applied to the future child. Instead of expanding an existing category, a new category is created to offer the future child a place within the law. The future child is addressed as the subject of legal relevant interests instead of rights. Although this strategy seems promising, it still faces difficulties when applied to the future child, which presumably has an interest in non-existence.

* Lisette ten Haaf is a Ph.D. candidate in Legal Theory at the Vrije Universiteit Amsterdam, Faculty of Law.

A. Introduction

As discussed in the introduction of this special issue, the classical distinction between persons and things is still present in contemporary jurisdictions.¹ A legal person is the bearer of rights, the actor in law, while a thing is the object of those rights, and is thereby at the disposal of the person. Traditionally, the category of the legal person was only open to human beings and corporations. In recent years, however, the person-thing distinction has been put under pressure due to an increasing demand for legal protection for different types of entities.² This call for legal protection is often formulated in a plea for the recognition of legal rights; for example, by arguing that entities such as animals, robots, and artificial intelligence have rights that need to be protected. This novel approach has caused a shift in the traditional person-thing dichotomy, and now offers these entities some form of legal protection. Entities that used to be regarded as objects are now becoming subjects.

The call for legal protection from harm also extends to future human life. Due to developments in human biotechnology and, in particular, Assisted Reproductive Technologies (ARTs), the potential to control human reproduction has rapidly increased. As a result, having a child has become more a matter of intentional choice rather than chance.³ This shift has given rise to “the idea of respect for the child as a future autonomous person with his or her own interests.”⁴ According to some, this respect for an unborn or future child also involves providing legal protection for these new, not yet existing, entities. As a result, law is currently challenged by two new entities: The conceived, yet unborn child and the unconceived, future child. If the law wants to give these entities some form of legal protection, it must incorporate these entities into the existing legal system. In other words, the law needs to qualify these entities to address them. The question is: Are these entities of future life protected as persons or things?

This question concerns how the Dutch legal system could and should protect the unborn and the future child from harm. The main obstacle for the attribution of legal personality to the future child and the unborn child is the fact that legal personality traditionally starts at birth. For this reason, the future and unborn child, in principle, are not seen as legal persons, that is, as subjects of rights. Nevertheless, this has not stopped the Dutch legislature and courts: In recent years, new legal measures have emerged, aiming to protect the unborn and future

¹ See Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 GERMAN L.J. (2017).

² See *id.*

³ Of course, the technology cannot guarantee a child to prospective parents. Yet, it cannot be denied that human reproduction has become more at our disposal, and because of this, there is a strong felt responsibility toward unborn and future children.

⁴ Guido Pennings et al., *ESHRE Task Force on Ethics and Law 13: The Welfare of the Child in Medically Assisted Reproduction*, 22 HUM. REPROD. 2585, 2585 (2007).

child from possible harm⁵ caused by, for example, a genetic defect or harmful conduct of the child's mother or parents. Moreover, though these recent measures seem far-reaching in themselves, there is increasing demand for further legal protection. These measures are characterized by a subject-oriented approach—they focus on the subjects' individual interests, rights, and risk of being harmed. More specifically, these measures are justified in terms of the benefits they provide to an individual subject, for example, the unborn or the future child. As a result, the unborn and future child have become a subject in the law. In sum, in Dutch law, there is an emerging trend in which the classic person-thing distinction has been reinterpreted with regard to new entities. Dutch law treats the unborn and the future child as a sort of person rather than a thing, even though these entities do not meet the standard requirements for legal personality.

The aim of this Article is twofold. First, it focuses on the concept of the legal person and identifies two subject-oriented strategies developed in Dutch law offering legal protection to some of these new entities. Second, this Article critically scrutinizes both strategies and points out some problematic aspects of both approaches. The first strategy for legal protection is discussed in Section B—the expansion of legal personality to protect the unborn child from harm. The focus lies on the protection of the unborn child from maternal harm, which is a type of foreseeable harm. Consequently, because the harm is foreseeable, prevention measures take place before the child's birth. After discussing the available measures for preventing this predictable type of harm, I argue that these measures imply a problematic expansion of legal personality. Section C deals with the second strategy, which is endorsed with regard to the future child. Instead of presenting the future child as the default legal subject—a legal person, and thus a subject of rights—it is presented as a subject of legally relevant interests. Although this strategy seems more promising, it still faces one problematic obstacle in particular when applied to the future child's interest in non-existence: Even the interest approach requires an entity to exist in the future, while the future child in this case is characterized by its non-existence. It should be noted that the main purpose of this Article is not to compare both strategies to each other, but to point out the pitfalls of both subject-orientated strategies. This analysis and reflection answers the main questions of this Paper: Which strategies are currently being used to incorporate the unborn and the future child in Dutch law and why are these subject-oriented strategies problematic?

Although this Article mainly focuses on Dutch law, it should be noted that the call for more legal protection for these future entities exists in other legal systems as well.⁶ The Dutch

⁵ See J.H.H.M. Dorscheidt, *Developments in Legal and Medical Practice Regarding the Unborn Child and the Need to Expand Prenatal Legal Protection*, 17 EUR. J. HEALTH L. 433, 442 (2010).

⁶ See, e.g., E.A.J. Beveridge et al., *What Protection for the Unborn Child of a Psychologically Vulnerable Adult?*, 96 J. R. SOC. MED. 92 (2003); see Kenneth McK. Norrie, *Protecting the Unborn Child from its Drug of Alcohol Abusing mother*, in *Law and Medicine: Current Legal Issues* 223 (Michael Freeman & Andrew Lewis eds., 2000); see PROJECT PREVENTION, <http://www.projectprevention.org/>. Also, Wicks acknowledges that even though the behavior of

legal system is of special interest because it has developed a variety of measures that offer legal protection to these entities, and because it is using innovative legal techniques where other countries seem more reluctant to do so. Furthermore, the applied strategies and the justification given for these strategies show the downfalls of both subject-oriented approaches. Nevertheless, there has been little in-depth discussion about the adopted approaches. Not only do I reflect upon the Dutch legal framework and Dutch legal-doctrinal literature, but I also include legal philosophical literature, for three reasons. First, this discussion puts the Dutch examples into a more general context. It shows that Dutch doctrine does not stand on its own, but is interconnected with legal philosophical thought. Therefore, the discussion of the Dutch legal system is also relevant for other legal systems struggling with the incorporation of new entities. Second, using legal-philosophical literature helps to elaborate and explain certain concepts that have not received sufficient attention in Dutch doctrinal discussion. Finally, an in-depth elaboration of the concepts currently employed helps to evaluate current strategies.

B. The Unborn Child and the Expansion of Legal Personality

1. Legal Protection for the Unborn Child

The knowledge that excessive drinking, smoking, and drug abuse during pregnancy or the refusal of prenatal care can harm the unborn child has put a spotlight on maternal harm—prenatal harm caused not by a third party, but by the unborn child's mother itself.⁷ This type of harm does not occur suddenly, like prenatal harm caused by, for example, a motorist who knocks down a pregnant woman and thereby hurts the fetus. On the contrary, it is foreseeable and therefore avoidable. The question is which legal measures can be adopted to prevent maternal harm during the pregnancy.

In the Netherlands, there are two ways to protect the unborn child from harmful maternal conduct.⁸ Both measures have been developed in adjudication and constitute new

pregnant women is barely regulated in the United Kingdom, "it is an issue often debated in legal circles." Elizabeth Wicks, *The State And The Body: Legal Regulation Of Bodily Autonomy* 42 (2016). Moreover, as Tuo Yu's contribution points out, the Chinese legal system is also confronted with the demand for more legal protection of the unborn child. See Tuo Yu chapter in this volume, 18 GERMAN L.J. (2017).

⁷ Several jurisdictions have addressed the question of whether alcohol or drug abuse during the pregnancy can be criminalized. For example, in the UK, a test case in which a girl suffering from damage caused by her mother's drinking during the pregnancy claimed that she was entitled to payments from the Criminal Injuries Compensation Authority. This case triggered the question of whether alcohol abuse during the pregnancy constitutes a criminal act. The claim, however, was rejected. See *CP (a Child) v. First-tier Tribunal (Criminal Injuries Compensation)* (2014) EWCA Civ 1554. In 2014, the US state of Tennessee enacted the Fetal Assault law, which permitted women to be prosecuted if they illegally used drugs while pregnant and their child was born addicted or harmed because of the drug abuse. Due to a sunset clause, the law remained in effect until July 2016.

⁸ See Dorscheidt, *supra* note 5 (providing a more elaborate discussion of this topic).

interpretations of existing legal norms. One possibility is imposing a family supervision order on the unborn child. If a family supervision order is issued, the legal authority of the parent(s) is restricted, and a family guardian is appointed to oversee the child's development. Importantly, imposing the family supervision order on the unborn child arguably raises a number of serious legal issues. The regulation on the family supervision order, article 1:254 of the Dutch Civil Code, refers to a minor, implying a child already born. To apply the regulation to the unborn child, the judge uses the *nasciturus* fiction, codified in article 1:2 of the Dutch Civil Code: "If it is in the interest of the child of whom the woman is pregnant, it will be regarded as already born. If it is born dead, it is considered never to have existed at all."⁹ With the help of this fiction, the unborn child is treated as if it had been born, so that a family supervision order can be issued.

The second way to protect the child is by admitting the pregnant woman to a psychiatric hospital.¹⁰ Importantly, compulsory admission cannot force the pregnant woman to accept prenatal care. Nonetheless, it does prevent her from taking drugs or alcohol, and treatment of her mental condition might make her more tolerant towards prenatal care. Based on article 2 of the Dutch Compulsory Admission to Psychiatric Hospitals Act (the CAPH act), such an order can be issued if someone, due to a mental disorder, is a danger to him- or herself or to "another person."¹¹ In case law, judges have ruled that the unborn child may count as "another person."¹² Contrary to the juvenile protection cases, the court does not appeal to the *nasciturus* fiction to make the interests of the unborn child legally relevant. It simply assumes that the unborn child counts as "another person."

II. Problematic Aspects

Although these developments in law are presented as self-evident and as if they logically follow from the existing legal framework, they give rise to several fundamental questions that have not received sufficient attention so far. First, it is not explained why the unborn

⁹ In Dutch: "Het kind waarvan een vrouw zwanger is wordt als reeds geboren aangemerkt, zo dikwijls zijn belang dit vordert. Komt het dood ter wereld, dan wordt het geacht nooit te hebben bestaan."

¹⁰ Similar cases appeared in other jurisdictions with different outcomes. For example, in *St George's Healthcare NHS Trust v S*; *R v Collins and others ex parte S* (1998) 2 FLR 728, a pregnant woman refused highly recommended treatment and was admitted to a psychiatric hospital against her will. The British Court, however, laid the emphasis on the mother's autonomy and her right to refuse medical treatment. See generally Melissa Nau et al., *Psychotic Denial of Pregnancy: Legal and Treatment Considerations for Clinicians*, 39 J. AM. ACAD. PSYCHIATRY L. 31 (2011) (discussing the approach of this topic in the United States).

¹¹ In Dutch: "een of meer anderen."

¹² See District Court Amsterdam April 25, 2000, *kBJ* 2000/47, H.J.J. Leenen; see District Court Amsterdam February 21, 2006, *Bj* 2007/6, J.K.M. Gevers (following the judgment in *kBJ* 2000/47). In another case, the pregnant woman was not admitted because addiction itself does not constitute a mental illness, but the judge emphasized the importance of protecting the unborn child against maternal harm. See District Court Amsterdam April 6, 2005, *Bj* 2005/19, W. Dijkers,

child fits into these categories that are usually restricted to existing people, that is, legal persons. Moreover, the court assumes that only the viable fetus deserves legal protection, but its attempt to justify the significance of the boundary of viability is not convincing; the justification is logically inconsistent and based on assumptions that are at odds with the general legal doctrine. Finally, as a result of the way these measures are applied, legal personality is attributed to the viable, unborn child. Consequently, one can say that birth is no longer a requirement for the attribution of legal personality; instead, the promise of existence is enough. In sum, regardless of whether legal personality should be attributed to the unborn child, I argue that these measures implying an expansion of the legal person do not follow from the law as logically as is often assumed.

1. *The Unborn Child as Another Person*

The first problematic aspect of these new developments is the lack of an explanation of why an unborn child can be understood as “another person” in the context of compulsory admission to a psychiatric hospital. In these cases, there is a strong focus on the interests of the unborn child, as courts stress the risks the unborn child faces due to its mother’s conduct or mental condition.¹³ These risks, however, can only be treated as a substantive ground for compulsory admission if the unborn child is seen as “another person.” Leenen, a renowned Dutch health law scholar, argues that the term “another person” can only refer to legal persons. Because the unborn child has no legal personality, as legal personality starts at birth, this concept cannot apply to the unborn child. Leenen also refers to the European Convention of Human Rights, where the term “everyone” does not include the fetus.¹⁴ Interestingly, the same line of reasoning was used in a similar British case: Despite the fact that a pregnant woman put her unborn child at risk, the Mental Health Act Commission concluded that the term “‘other persons’ does not include an unborn child irrespective of gestation and viability,” for an unborn child has no legal rights.¹⁵

Whereas the British Commission argued that there was no legal ground for admission,¹⁶ Dutch judges opted for a more extensive interpretation of the notion of “another person.” Ignoring the argument posed by Leenen, they emphasized the unwanted consequences of

¹³ See Leenen, *supra* note 12; Dijkers, *supra* note 12; Gevers, *supra* note 12.

¹⁴ Two years after Leenen’s annotation, the ECHR left a little bit more wiggle room in the Vo case. In that case, it refused to answer the question of whether the term “everyone” in Article 2 of the Convention also included an unborn child. The Court left it up to the member states to decide on the legal status of unborn life. See *Vo v. France*, App. No. 53924/00, para. 85 (Jul. 8, 2004), <http://hudoc.echr.coe.int/>.

¹⁵ Beveridge, *supra* note 6, at 92.

¹⁶ There was no legal ground not only because the unborn child has no legal rights, but also because the patient did not have a mental condition that could justify the compulsory admission. Also in other areas of UK law, it is assumed that the unborn child’s lack of legal personality prevents it from being regarded as “another person.” See *CP (a Child) v First-tier tribunal (Criminal Injuries Compensation)*, *supra* note 7, para. 39.

refraining from interfering. By not interfering, the child would only be protected from harm after its birth, while the harm is caused in the prenatal stage. In one case, the judge states that this result is unacceptable, and that it is necessary to include the unborn child in the concept for this reason.¹⁷ Several scholars have applauded this extensive interpretation, approving of the fact that the interests of the unborn child are taken into account.¹⁸ They argue that the extensive interpretation is in line with the law because the preamble of the Convention on the Rights of the Child states that the child deserves protection both before and after its birth. Moreover, in Dutch law, the fetus gains more legal protection during its development: Once the fetus is viable, which, according to Dutch law, is after 24 weeks, abortion is no longer legal. For this reason, viability constitutes an important reason to offer the unborn child more legal protection. Even though the court does not refer to the developmental stadium of the unborn child, Dutch health law lawyer Gevers believes that the fetus can only count as an “another person” if it is viable because viability is such an important demarcation point.¹⁹ Another legal scholar, Dijkers, also claims that in these cases, the interests of the unborn child should be taken into account, at least in the final stages of the pregnancy.²⁰ Neither considers, however, the question of whether the stronger status of the fetus implies that it can be treated as “another person,” and thus as a legal person for the purposes of the Compulsory Admission to Psychiatric Hospitals act. Only Flinterman addresses this point, connecting the CAPH act to the *nasciturus* fiction. She argues that once the fetus is viable and there is no possibility of abortion, it follows from article 1:2 BW that the fetus should be treated as a person,²¹ to the extent its interests require.²² In other words, the unborn child is treated as a legal person in this context, but only once it has reached viability.

¹⁷ See Gevers, *supra* note 12.

¹⁸ See Dorscheidt, *supra* note 5, at 444; Gevers, *supra* note 12, at 66; see J.G. Sijmons, *Reactie op FJR 2009*, 3, 31 TIJDSCHRIFT VOOR FAMILIE EN JEUGDRECHT 15, 16 (2009).

¹⁹ See Gevers, *supra* note 12, at 66.

²⁰ See Dijkers, *supra* note 12.

²¹ Interestingly, contrary to what Flinterman argues, Article 1:2 CC does not directly state that the future child is deemed to be a legal-person whenever its interests require this. Instead, it is considered to be born. Of course, according to legal doctrine, legal personality coincides with the biological birth and as Van Beers has pointed out, the only benefit the unborn child could gain from being considered to already be born, is to be considered a legal person. See Britta van Beers, *Persoon en lichaam in het recht. Menselijke waardigheid en zelfbeschikking in het tijdperk van de medische biotechnologie* 231 (2009).

²² See Dia Flinterman, *Het ongeboren recht op ongeschonden bestaan. Jeugdbescherming en jeugdstrafrecht nader bekeken*, in HONDERD JAAR ZORG OM HET KIND 73, 75 (A.P. van der Linden ed., 2006).

2. *The Importance of Viability*

Another aspect that raises questions is the assumed importance of the viability boundary. The court attributes a certain significance to viability that does not follow from law or legal doctrine. Whereas in the case law on mental health law it is merely assumed that the protection only includes a viable fetus, in the family supervision order it is explicitly stated that the order can only be applied if the mother is pregnant for 24 weeks or more. In one case the court ruled that the family supervision order cannot be imposed on a 17-week old fetus. The argument the judge used to justify this claim was, however, rather peculiar. He claimed that “allowing the request would imply, because the fetus is not yet viable, that the mother is placed under supervision” for which there is no legal basis in Dutch law.²³ The judge stressed the importance of viability, but he failed to give a convincing argument. After all, both the non-viable and the viable fetus are still in the womb of the mother. For this reason, viability does not change the effect of imposing a family supervision order on an unborn child: In both cases, the mother is put under supervision, for which, as the court argued, there is no legal basis in law. In short, the argument used is logically inconsistent. If the fact that, effectively, the mother is put under supervision is the reason why the order cannot be imposed on the non-viable unborn child, it should not be any different for the viable unborn child; after all, just like the non-viable fetus, the viable fetus child is still in the mother’s womb. Therefore, in both cases the mother is affected in the same way by the family supervision order. In conclusion, this argument cannot justify the distinction between the viable and the non-viable unborn child.

This weak argumentation raises the question of why viability should be deemed so important for the legal protection of the unborn child. Some authors refer to the doctrine of progressive protection: The unborn child, or fetus, gains a stronger legal status during the pregnancy, during which nidation and viability mark the most important stages of development.²⁴ The moment of viability is of legal importance because after 24 weeks, abortion is no longer allowed. Consequently, it is argued, if the fetus is protected from abortion, it also must be protected from other possible harms, such as maternal harm. This protection would fit with the stronger legal status given to the fetus upon attaining viability. Moreover, attributing legal protection to a non-viable fetus may be problematic for a second reason. It may collide with the existing abortion regulation.²⁵ After all, if the non-viable fetus is protected from lesser forms of harm, can we still justify not protecting it from abortion, which has the largest impact on the fetus? In short, the possibility of legal abortion seems to have had a general impact on what sort of protection is deemed justifiable for the fetus.

²³ District Court Dordrecht February, 7 2012, *JPF* 2012/82, P. Vlaardingerbroek.

²⁴ See Dijkers, *supra* note 12, 125; see Gevers, *supra* note 12, at 66.

²⁵ See M.W. Bijlsma et al., *De mogelijkheid van ondertoezichtstelling van het nog ongebooren kind bij twijfels over de veiligheid van de thuissituatie*, 152 *NEDERLANDS TIJDSCHRIFT VOOR GENEESKUNDE* 895, 898 (2008).

Notably, connecting the *nasciturus* fiction and legal protection to viability is based on two assumptions that are problematic because they contradict both the fiction itself and legal doctrine as well. First, the presumed connection suggests the *nasciturus* fiction can only be applied to the viable fetus, as if only the interests of the viable fetus are legally relevant and require legal protection. Nonetheless, the application of the *nasciturus* fiction is not restricted to the 24th week and subsequent weeks.²⁶ On the contrary, the Civil Code itself speaks of “the child of whom the woman is pregnant” (and not merely the viable fetus). Additionally, Dutch legal doctrine states that the fiction may be properly applied in an earlier developmental stage, in any event, from the moment of nidation²⁷ or perhaps even before that.²⁸ There is therefore no legal rule stating that only the interests of a viable fetus may be taken into account.

The second problematic assumption arises because restricting the application of the *nasciturus* fiction and applying the protection measures to only viable fetuses gives the impression that the non-viable fetus deserves no legal protection. One judge even argued that “because the mother is only 17 weeks pregnant, the unborn child deserves no legal protection.”²⁹ Several Dutch legal scholars, however, have stressed that a non-viable fetus also deserves some protection. Leenen acknowledges the importance of viability, for the purposes of international law, pointing out that a fetus younger than 24 weeks can have interests that ethically and legally deserve protection.³⁰ Dutch health law scholar, Blankman, calls the 24 week-boundary “artificial” if there is, in an earlier stage of the pregnancy, an evident desire to carry the child to term, and the unborn child faces the risk of being harmed. He claims the degree of probability and extent of the harm should be equally decisive.³¹ In addition, judge and family law scholar, Vlaardingerbroek, states that the fetus or unborn child deserves legal protection from the moment of conception, instead of viability, and that this protection does not interfere with the woman’s right to abortion.³² Legal philosopher, Van der Burg, takes it one step further, claiming that the boundary of viability is only relevant with regard to abortion. According to him, it does not attribute legal protection or a specific legal status to the unborn child in any other respect; for this reason, the mother cannot be

²⁶ See B. Sluyters, *Civielrechtelijke aansprakelijkheid voor medische fouten voor de geboorte*, in *Grenzen aan de Zorg; Zorgen aan de Grens* 133, 134 (J.K.M. Gevers & J.H. Hubben eds., 1990).

²⁷ See H.J.J. Leenen et al., *Handboek Gezondheidsrecht* 348 (2014).

²⁸ See Asser 1*, *Personen- en Familierecht* § 1 Section no. 23 (J. de Boer ed., 2010); see Wibren van der Burg, *De juridische ‘status’ van het embryo: een op drift geraakte fictie*, *TJDSCHRIFT VOOR GEZONDHEIDSRRECHT* 386, 388 (1994).

²⁹ Vlaardingerbroek, *supra* note 23.

³⁰ See Leenen, *supra* note 27, at 352.

³¹ See K. Blankman, *Reactie op FJR 2009*, 3, 31 *TJDSCHRIFT VOOR FAMILIE EN JEUGDRECHT* 13, 13–14 (2009).

³² See Vlaardingerbroek, *supra* note 23.

forced, before or after the fetus has become viable, to live a healthy life or to stop smoking or drinking.³³

The examples discussed in this paper show courts struggling to justify their claims on the status of the unborn child. This struggle seems to focus particularly on the distinction between viability and non-viability, and the attempt to rationalize its significance. Nonetheless, the mere fact that the viable fetus may have a stronger legal status does not imply that only the interests of the viable fetus are worth protecting. Although this strict distinction applied in adjudication cannot fully be explained from a legal perspective, there may be an explanation from a social perspective. Before the 24th week, a woman may lawfully terminate her pregnancy. Hypothetically, we are left with the odd situation in which, to get rid of unwanted outside interference, a woman may lawfully take the ultimate step to end her pregnancy, for without the unborn child, there is no ground for interference. In this case, the interference ostensibly aiming to protect the unborn child would backfire: Instead of securing the child's health interests and ensuring it comes into existence without health damage, the child would not come into existence at all. If the prospective mother, however, does not choose to abort within the legal limit, then it can be said there is an *intention* to bring the child into existence.³⁴ After all, if she did not want to carry the child to term, she would have opted for an abortion when she had the chance. Only after 24 weeks can one be confident of the child's birth, and hence its legal recognition.³⁵ Because the unborn child's future existence is certain at that point, all things being equal, it is argued, there is a compelling reason to anticipate the future child's existence and prevent it from being harmed. Because of this reasoning, the viability boundary gains a new meaning because it no longer just marks a step in the embryo's development. Instead, it has become the demarcation point of a future person's existence becoming more certain, requiring new forms of protection for this future person.³⁶

³³ See Van der Burg, *supra* note 28, at 393–94. Due the new developments, it seems that nowadays it is possible to push the mother into a certain life style by controlling her behavior.

³⁴ See also Flinterman, *supra* note 22, at 75.

³⁵ Of course, the possibility remains that for some reason, the child is stillborn.

³⁶ It is at this point that two different perspectives on unborn life become clear. Certain actions, such as (late term) abortion or selling embryos are prohibited or heavily restricted in order to protect the embryo itself. Because of the inherent value of the embryo, whether because it has human dignity or because it is part of human life, the embryo itself challenges the person-thing distinction, as has been elaborated by Selkälä and Rajavuori in the introduction. See Selkälä and Rajavuori, *supra* note 1. However, other actions, like the mother's behavior, are regulated or controlled, or an attempt is made to do so, not because of the need to protect the embryo, but to protect the child that will be born in the future and that, at that moment, will suffer from the negative consequences of these actions.

III. The Expansion of Legal Personality: From Existence to a Promise of Existence

So far, I have discussed two concerns, namely the lack of explanation why the unborn child fits into certain categories and the lack of a sound explanation why viability is deemed so important. The two maternal harms preventing measures developed in Dutch adjudication are not only challenged by these two concerns. They also imply a problematic expansion of legal personality to include the viable, unborn child. In addition, this expansion changes the relation between legal personality and existence. The promise of existence has become sufficient for the attribution of legal personality.

Existence, or being alive, can be seen as a requirement for legal personality. In Dutch law, as in most legal systems, legal personality starts at the moment of birth³⁷ and ends at the moment of death. Although this rule is not part of statutory law, legal philosopher Van Beers claims that the relation between birth and legal personality can also be derived from the *nasciturus* fiction found in article 1:2 of the Dutch Civil Code. The fiction designates the child can be regarded as already born, and the only benefit it gains from this fiction is the attribution of legal personality. Moreover, the relation between existence and legal personality becomes also visible in the second sentence of this article: If the child is born dead, it is considered never to have existed at all. From this, Van Beers concludes that existence or being alive is a condition for legal personality.³⁸

Of course, exceptions can be made with the help of this *nasciturus* fiction: The unborn child is regarded as born when its interests require. This fiction enables a person to legally respond to events that took place before his or her birth. In Roman law, the *nasciturus* fiction enabled a child to inherit from its father if the latter died before the child's birth. In our age, the fiction is also used in cases of prenatal harm, so that a child, once born, can respond to a legal wrong that occurred during the pregnancy.³⁹

³⁷ See Asser 1*, *supra* note 28, no 21.

³⁸ See Van Beers, *supra* note 21, at 231.

³⁹ For example, in the *Baby Kelly* case, the fiction was used. Importantly, the *Baby Kelly* case was not about prenatal harm, but about wrongful life. In UK law, the *nasciturus* principle is also used to award damages in case of prenatal injury or other types of prenatal harm. See Norrie, *supra* note 6, at 225.

Although it is not clearly stated which interests can invoke the fiction,⁴⁰ many have argued that it should also extend to health interests.⁴¹ This may seem unproblematic at first, yet taking health interests into account differs in one important aspect—the fiction is applied at a different moment. The fiction can only be applied if the child is born alive; after all, if it is born dead, it is considered never to have existed at all.⁴² Therefore, to be certain whether the fiction can be applied, it is better to wait until the child is born. In property law, on the one hand, it is no problem to wait until the child is carried to term and born before its interests are retrospectively considered. The distribution of the inheritance or filing of claims for damages can be postponed until the child is born without the risk that this will affect its interests. On the other hand, to secure health interests, especially in cases of prenatal harm, interference needs to take place before the child is born to prevent damage.

This proactive, anticipatory application of the *nasciturus* fiction constitutes an expansion of legal personality. Importantly, if interference takes place during pregnancy, there is no guarantee that the child will be born alive. Especially because the child's health is affected, there is a risk the damage already done is fatal. If the child dies before birth, then it is considered never to have existed at all. Put differently, there is and never was a child that required anticipatory protection of its interests. As a result, the justification for imposing the measure that restricts the mother's freedom does not exist and has never existed. Nonetheless, the possibility that the child may not come into existence and for this reason never will exist, seems to be ignored in the Dutch legal doctrine. Instead, the focus lies on the assumed intention to bring the viable fetus into existence. The child's *possible* future existence is deemed enough to anticipate the interests and rights it will have, if it comes into existence. In sum, the measures discussed above differ from existing law on the point that the child is not yet born when the fiction is applied. At that moment, there is no absolute certainty of the child's existence. Still, considering the fact that only viable fetuses are protected this way, it can be argued there is an intention to bring the child into existence. Consequently, the actual birth is no longer necessary, as the child's assumed future existence is enough to treat it as a legal person.⁴³

⁴⁰ It is clear that the fiction pertains to property law. See Asser 1*, *supra* note 28, at no. 23. Also in other legal systems, the *nasciturus* fiction is often invoked in the context of monetary interests. See, for example, §1923 abs. 2 of the German Civil Code, which enables an unborn child to inherit from someone who died before its birth. Also Tuo Yu has pointed out the *nasciturus* fiction at least pertains to monetary interests. See Yu, *supra* note 6.

⁴¹ See Sijmons, *supra* note 18, at 15–16; see Flinterman, *supra* note 22, at 76; see R.J.P. Kottenhagen, *Botsende rechten van moeder en ongeborn kind*, TIJDSCHRIFT VOOR GEZONDHEIDSRICHT 492, 498 (2008).

⁴² According to Norrie, the *nasciturus* principle endorsed in UK law also requires the child to be born alive. See Norrie, *supra* note 6, at 228. The requirement that the child has to be born alive in order to apply the fiction is also pointed out in the contribution of Tuo Yu regarding Chinese succession law. See Yu, *supra* note 6.

⁴³ Of special interest in this respect is Kottenhagen. He claims that with the help of a proactive interpretation of the *nasciturus* fiction, the legal duty of parents to take care of their children and secure that physical and mental wellbeing can be applied to the unborn child. As a result, once a pregnant woman does not choose for abortion, but chooses to bring the child into existence, she also accepts the moral and legal duty to take care of her unborn

IV. Final Remarks on the Unborn Child

To prevent maternal harm, Dutch adjudication has developed two measures to protect the unborn child. These measures are characterized by the expansion of legal concepts, which normally only apply to legal persons, to include the unborn child. First, Leenen has pointed out that “another person” refers to a legal person. Moreover, in the case of the family supervision order, the expansion is achieved with the help of the *nasciturus* fiction. By applying this fiction, the child is considered to be born, and therefore, to be a legal person, as far as its interests require. Further, even though existing concepts traditionally refer to existing subjects with legal personality, these have been applied to unborn children instead of creating new legislation. By treating the unborn child as already born if its interests require, the unborn child is included in these concepts. By doing so, the unborn child is regarded as a legal person. Consequently, the implications of these measures are that legal personality has been attributed to the unborn child, albeit in a limited form and in a restricted number of cases.

The expansion of legal personality is *prima facie* not contradictory to law. The rule that legal personality starts at birth has always had exceptions, hence the *nasciturus* fiction, which can create the fiction that the juridical birth took place at an earlier moment. Importantly, regardless of whether unborn life deserves legal protection from harm and should have legal personality, the strategy chosen in Dutch law does not simply follow from the existing legal framework, even though it is presented as if it does. Instead, these measures are based on several implicit and unelaborated assumptions, rendering two aspects of this strategy problematic. The first aspect—the problematic distinction between the viable and non-viable fetus—pertains to the fact that it is not deemed necessary or desirable to legally protect the unborn child against maternal harm from the beginning to the end of the pregnancy. Strengthening the legal position by legally protecting the embryo in the earliest stages of its development is especially likely to go against the existing Dutch legal framework on the embryo and abortion. Be that as it may, the strong emphasis on viability may leave the non-viable child unprotected while in the earliest stage of the pregnancy when maternal harm can cause the most damage. So, although the expansion of legal personality does offer possibilities to protect the unborn child from its mother’s harmful conduct, it also raises several questions on whether these constructions really follow from the existing legal framework, as is claimed.

child and accept adequate, prenatal care. See Kottentagen, *supra* note 41, at 499. This, however, is an even further expansion of legal personhood and the status of the unborn child. The unborn child in Kottentagen reasoning is not treated as an entity that will exist in the future and whose interests need to be anticipated; instead, accepting a legal duty to prenatal care in order to bring the child into existence pertains to the unborn child as a fetus and therefore, implies an enormous increase of the legal status of the embryo, rather than the unborn child.

The second problematic aspect pertains to the moment of application of the fiction. Traditionally, the fiction was applied after the child's birth because in the case of a stillborn child, no child—and therefore no legal person—has ever existed. The prevention of harm, on the contrary, requires a proactive approach because waiting for the child's birth may be too late. By that point, physical harm may already have manifested, perhaps even causing the child's death before its birth. This risk of stillbirth renders the proactive application problematic because if the child does not come into existence, the child, and consequently the justification for interfering in the mother's private life, never existed at all. Moreover, because existing legal measures to prevent harm are currently deemed only applicable to the viable fetus, it can be said the unborn child's intended existence is already enough to apply the *nasciturus* fiction and to attribute legal personality. This causes a shift in the relation between legal personality and existence; existence as a requirement for legal personality is replaced by the promise of existence.

C. The Future Child and the Subject of Interests

I. Legal Protection for the Future Child

Prenatal harm to the child does not have to be caused *during* the pregnancy; in some cases the risk of harm is inherently connected to the child's condition of existence. This is the case when, for example, the child has a severe genetic condition or when its biological parents lack the capacity to raise the child and thereby pose a risk of abuse or neglect. This type of harm cannot be prevented by influencing or guiding the woman's behavior during the pregnancy. The only way to prevent such harm is to act before the child's conception has taken place. This is the domain of the future child—the child that has not yet been conceived but might be in the future.

In Dutch law, there are several examples of regulation and legislation that explicitly refer to the future child.⁴⁴ First, the professional guidelines for access to fertility treatments⁴⁵ point out that a fertility treatment may be refused on moral grounds alone. Physicians can take the interests of the child resulting from the treatment—the future child—into account; if they believe the child does not have a reasonable chance of decent welfare, they can refuse

⁴⁴ In other jurisdictions, the interest or the welfare of the child is taken into account in decision making on the application of fertility treatments and Assisted Reproductive Technologies. One example is section 13(5) of the British Human Fertilisation and Embryology Act 2008: "A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment." Also in the ECtHR case *S.H. e.a. v. Austria*, the interests of the future child were considered an important factor in the regulation of Assisted Reproduction Technologies. See *S.H. e.a. v. Austria*, App. No. 57813/00, paras. 101, 105, 113 (Nov. 3, 2011), <http://hudoc.echr.coe.int/>.

⁴⁵ See NVOG Modelprotocol: Mogelijke morele contra-indicaties bij vruchtbaarheidsbehandelingen (2010).

the treatment.⁴⁶ This guideline allows physicians to exclude prospective parents with a history of child abuse or neglect, or those suffering from a mental or psychological disorder.

Another topic in which the interests of the unborn child play a central role is in the regulation of preimplantation genetic diagnosis (PGD). This technique, also known as embryo selection, can be applied when the future child runs the risk of suffering from a severe genetic condition.⁴⁷ Notably, the interests of the future child serve as the only justification for PGD. The technique may not be employed for gender selection to fulfill the parents' wish to have a boy or a girl, nor can the technique be used to select a suitable donor for a relative, if only this relative will benefit from it.⁴⁸

Whereas PGD can only be used for prevention of harm caused by a genetic condition, refusing access to fertility treatment can be used to prevent harm caused by both a genetic condition and the potential parents. Nevertheless, prevention of harm to the future child in these cases is only possible if the prospective parents require fertility treatment. Blankman correctly points out that there are barely any measures for intervention in the stage before the pregnancy.⁴⁹ He suggests the possibility of compulsory contraception. Compulsory medical treatment like this is only possible in Dutch law if the woman is incapacitated and if the treatment is beneficial for the woman herself; treatment that prevents harm to others, such as the child, is not legally possible.⁵⁰ With the help of extensive interpretation, it might be possible to issue compulsory contraception in a limited number of cases—that is, only those cases in which the woman is incapacitated and a legal guardian has consented in her place. Still, the problem lies in the fact that there are many cases in which the prospective parents are not incapacitated, and not in need of a fertility treatment, but still pose a risk for the future child. This problem has been addressed in Dutch public debate over the past few years, advocating the possibility of introducing forced contraception upon prospective parents who appear incapable or ill-equipped to raise a child, thereby exposing the child to

⁴⁶ The professional guidelines argue that this standard offers the right balance between the prospective parents' interests and right to family life and the physicians duty to provide decent health care. After all, with regard to reproductive treatments, the involved physicians have a double responsibility and must take care of the interests of both the mother and the child. The responsibility towards the future child requires that the physician does more than only securing the minimum for the child. Moreover, the professional guidelines argue that the standard of a decent chance to reasonable welfare is also internationally preferred. See NVOG Modelprotocol, *supra* note 45, at 2, 3.

⁴⁷ See Parliamentary Documents "Kamerstukken II 2005-2006, 30 300 XVI, nr 136," 1.

⁴⁸ The creation of savior siblings, or selection on HLA-type is only allowed if the procedure is necessary in the first place to select on the genetic condition for which a donor is necessary. So, only when the future child itself runs a risk to have the same genetic condition as its ill sibling which justifies the PGD process, then additional selection is allowed.

⁴⁹ See Blankman, *supra* note 31, at 14.

⁵⁰ See also Art. 7:465 BW.

physical or psychosocial harm. Although an MP of the Dutch labor party⁵¹ attempted to instigate this discussion in parliament⁵² and proponents have emphasized the necessity of this measure in public debate,⁵³ it is not possible, for now, to force contraception on people despite their incapacity to raise a child.⁵⁴ Nevertheless, this discussion does show that there is an increasing demand for more legal protection of the interests of the future child. Because the future child remains on the agenda, the legislator must find a way to deal with it.

Importantly, with regard to the legal protection of a future child, a different strategy has been endorsed. Instead of expanding legal personality, the future child is presented as a different type of subject, namely a subject of interests. As a subject of interests, the future child becomes relevant to the Dutch legal system. Legislation does not refer to the “rights of the future child,” nor does it attempt to fit the future child into existing categories; instead, it only refers to the future child’s interests. In the examples discussed here, the future child is attributed one specific interest—the interest in its own non-existence. It is assumed that in those cases in which the future child’s wellbeing cannot sufficiently be guaranteed, the child is better off if it does not exist at all. What all the different ways of protecting the future child’s interests have in common is that as a result of taking its interests into account, the child’s conception is prevented. In other words, the future child is protected by preventing its existence rather than by improving the circumstances under which it comes into existence, as is currently the practice with regard to the unborn child. By taking this approach, the Dutch legislator resorts to a wrongful life-argument, which assumes that it can be in the interest of the future child not to exist, if it has a “life not worth living” in which not even a bare minimum of wellbeing can be guaranteed, although in some legal systems the concept of “*lebensunwertes Leben*” has been rejected, with the argument that all life, despite its impairments, has a value and is worth living. Many philosophers have accepted

⁵¹ “Partij van de Arbeid.”

⁵² See Parliamentary Documents “Kamerstukken II 2009-2010, 32 405 nr. 2.”

⁵³ See J. Boonekamp, G. de Wert, R. Bergmans, *Geef een junk geld voor geboortebeperving*, NRC November 9, 2010; N. Smet, *Als je haar kind afpakt, neemt ze meteen een nieuwe*, NRC next September 2, 2011; *Zembla: Vader en moeder: ongeschikt*, VARA Nederland 2, April 13, 2012 (featuring a Dutch tv show on this topic); *Wij, rechters, willen een wet die verplichte anticonceptie mogelijk maakt*, NRC Handelsblad maart 4, 2015; *Verplichte anticonceptie bij falende ouders*, Algemeen Dagblad April 17, 2015; ‘Verplicht kwetsbare ouder tot tijdelijke anticonceptie’, *Volkskrant* oktober 1, 2016; *Rotterdam: verplicht spiraaltje bij incompetent ouders*, Algemeen Dagblad oktober 2, 2016.

⁵⁴ Forced sterilization has been condemned by the European Court of Human Rights as a violation of Articles 3 and 8. See *V.C. v. Slovakia*, App. No. 18968/07, (Nov. 8, 2011), <http://hudoc.echr.coe.int/>. Nonetheless, the case presented before the European Court differs in two important aspect from the Dutch debate on compulsory contraception. First, the European Court of Human Rights did not have to address the question of whether forced contraception could be justified in order to protect the interests and wellbeing of the future child, as argued by the Dutch proponents of compulsory contraception. Second, the proposals in the Dutch debate pertain to a temporary, reversible form of contraception instead of sterilization.

the idea that the prevention of certain lives can be justified.⁵⁵ Contrary to the philosophical debate—which assumes that if this interest in non-existence indeed exists, however, it only pertains to the most severe and gruesome cases⁵⁶—the Dutch regulation rejects the standard of minimum wellbeing in favor of “reasonable wellbeing.”⁵⁷ Aside from raising the question of whether the assumption of an interest in non-existence is compatible with the notion of human dignity, this approach also raises the question of whether non-existence is indeed in the interest of the future child.⁵⁸ Yet, despite this criticism, the Dutch regulation appeals to the interests and welfare of the future child as a pivotal justification for its regulation of reproduction, thereby treating the future child as a subject of interests.

The attribution of interests may seem less problematic than the expansion of legal personality, because the vocabulary of interests is less bound by legal doctrine. While legal doctrine has dictated, for example, which entities can be legal persons, it has not elaborated as much on the subjectivity of interests. Therefore, other entities can also be the subject of interests. Moreover, an additional benefit is that the attribution of the subjectivity of interest does not immediately give an entity the same legal—and moral—status as a legal person. Still, this strategy gives rise to two important questions. First, what the attribution of interests means for the legal status of the entity remains unexplained. More specifically, what are the legal implications of having an interest as compared to having a right? What is the difference between the two concepts? The second question pertains to the capacity to possess an interest. Which entities are capable of having interests, and in that vein, can the future child, in the form of a non-existent entity, have interests—particularly the interest in non-existence? In order to answer these questions, we need to look beyond the regulation regarding the future child and explore a more philosophical account of interests and their relation with rights.

⁵⁵ See, e.g., John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* 75 (1994); Allen Buchanan et al., *From Chance to Choice* 239 (2009); Stephen Wilkinson, *Choosing Tomorrow's Children: The Ethics of Selective Reproduction* 70–71, 97 (2010); I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 439 (2011); P.G. Peters, *Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARI. L. REV. 487, 487 (1989).

⁵⁶ See Cohen, *supra* note 55, at 472–73; Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, in *Freedom and Fulfillment: Philosophical Essays* 3, 17 (Joel Feinberg ed., 1994); Buchanan et al., *supra* note 55, at 239; Wilkinson, *supra* note 55, at 71; Julian Savulescu, *Is there a Right not to be Born? Reproductive Decision Making, Options and the Right to Information*, 28 J. MED. ETHICS 65 (2002).

⁵⁷ See NVOG Modelprotocol, *supra* note 45, at 2. Importantly, it is highly unlikely that a same standard would be endorsed if a compulsory contraception measure ever would become reality because the higher standard used in the context of ARTs is considered justified due to the responsibility of the physician towards the child that would result from the treatment.

⁵⁸ Glenn Cohen has pointed out that in different legislation in which the future child's existence is prevented, it is justified with an appeal to the future child's interests. He also points out the problematic nature of this appeal, as it cannot be said that the future child in all these cases actually has an interest in its own non-existence. See generally Cohen, *supra* note 55.

II. The Subject of Interests

1. Rights vs Interests

Understanding the difference between legal rights and interests is complicated because of the close entanglement of the two concepts. As civil law scholar Nieuwenhuis points out, a right cannot exist without an interest.⁵⁹ Also, in legal philosophy, the relation between interests and rights is a common notion, especially in the debate on who may be the subject of rights. Many legal philosophers hold that only those entities that can have interests are capable of having rights.⁶⁰ Feinberg offers two reasons for the close link between rights and interests.⁶¹ First, he claims, “a right holder must be capable of being represented and it is impossible to represent a being that has no interests.” Furthermore, “a right holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefitted, having no good or ‘sake’ of its own.” According to the interests theory of rights, the relation between interests and rights is even stronger: Not only is the capacity to have interests a requirement for the capacity to have rights, the function of rights is to protect and further the rights holder’s interests. Raz, one of the main proponents of the interests theory, says one (X) has a right “if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.”⁶² For Raz, rights constitute grounds for duties.⁶³ Therefore, a right is defined by referring to the duty;⁶⁴ a right exists if the rights holder’s interest is of such importance that it generates a legal obligation on the part of others not to violate that interest.

But what, then, is an interest? It has been pointed out that the concept is rather vague.⁶⁵ In her reflection upon the concept “interest” in Dutch law, *belang*, Wiggers-Rust takes a literal approach as she describes an interest as “something that affects somebody, because it

⁵⁹ See J.H. Nieuwenhuis, *Confrontatie en Compromis. Recht, Retoriek en Burgerlijke Moraal* 29 (1992).

⁶⁰ See Leonard Nelson, *A System of Ethics* 136–44 (1956); H.J. McCloskey, *Rights*, 15 *PHIL. Q.* 115, 126 (1965); Joel Feinberg, *The Rights of Animals and Unborn Generations*, in *PHILOS. & ENV. CRISIS* 43, 51, 57 (W. T. Blackstone ed., 1974); Joseph Raz, *The Morality of Freedom* 176 (1988).

⁶¹ See Feinberg, *supra* note 60, at 51.

⁶² Raz, *supra* note 60, at 166.

⁶³ See *id.* at 167.

⁶⁴ See also M.H. Kramer, *Rights without Trimming*, in *A Debate over Rights* 13 (M.H. Kramer et al. eds., 1998).

⁶⁵ See McCloskey, *supra* note 60, at 126; Lidy F. Wiggers-Rust, *Belang, Belanghebbende en Relativiteit in Bestuursrecht en Privaatrecht* 17 (2011).

affects his benefit, or his wellbeing.”⁶⁶ This definition captures what we speak of when describing the interests of the future child: The legislation that appeals to the future child’s interest is concerned with its wellbeing and the possible negative impact of physical or psychosocial harm. Wiggers-Rust’s definition can also be found in legal-philosophical literature. Raz, for example, describes it as “some aspect of one’s wellbeing.”⁶⁷ Feinberg⁶⁸ and Kramer⁶⁹ also relate interest to the entity’s wellbeing.⁷⁰ Following this definition, it must be concluded that the concept of interest is a very broad category—some aspect of one’s wellbeing or benefit can refer to almost anything, especially when considering that wellbeing has several components, such as physical, emotional, social, and psychological components.

Wiggers-Rust emphasizes that “interest” is indeed a much broader category than that of a “right,” and therefore, “interest” and “right” are not interchangeable concepts.⁷¹ Although there is no right without an interest, not every interest may be translated into a right, thereby raising the question: Why not? An answer to this question can be found in the interest theory of rights as defended by Raz and Kramer. Both claim that having an interest is not enough to constitute a right. Kramer states that someone—an interest-holder—holds a legal right only if “at least one minimally sufficient set of facts include the undergoing of detriment by some person Q at the hands of some other person R who bears a duty under contract or norm.”⁷² According to Raz, an interest can be translated into a right “only where one’s interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and finally, only when the duty for conduct which makes a significant difference for the promotion or protection of that interest.”⁷³ In short, the interest can be translated into a right only if there is a legal duty not to violate the holder’s interest. Here the difference between rights and interests becomes visible—something can be in the subject’s interest, even though the subject does not have a right to it.

⁶⁶ Wiggers-Rust, *supra* note 65, at 18.

⁶⁷ Raz, *supra* note 60, at 166.

⁶⁸ See Feinberg, *supra* note 60, at 49–50.

⁶⁹ See M.H. Kramer, *Refining the Interest Theory of Rights*, 55 AM. J. JURIS. 31, 33 (2010).

⁷⁰ Regan distinguishes two definitions of “having an interest.” The first is a more subjective interpretation and can be understood as “taking an interest in.” What is in the subject’s interest is then defined by the subject’s desires and wishes. The second interpretation takes a more objective approach; to say that someone has an interest in X means that X benefits this person, connecting interest to the subject’s wellbeing. The second approach is similar to the definition of interest used here. See T. Regan, *McCloskey on Why Animals Cannot Have Rights*, 26 PHIL. Q. 251, 253–54 (1976).

⁷¹ See Wiggers-Rust, *supra* note 65, at 37–38.

⁷² Kramer, *supra* note 69, at 36–37.

⁷³ Raz, *supra* note 60, at 183.

It is, legally speaking, incorrect to assume that all interests acknowledged and incorporated by a legal system are automatically translated into rights and those interests not translated into rights have no significance in the law whatsoever. For this reason, not everything that is protected by law constitutes a right.⁷⁴ It is possible for a legal system to recognize an interest as being valid or significant without labeling it a right. Reflecting upon the relation between right and interest in Dutch law, Wiggers-Rust points out that law (*recht*) is more than a collection of rights, because it also includes interests acknowledged and protected by the law (*rechtsbelang*).⁷⁵ There are also interests, however, that gain no legal protection as they bear no significance for legal reasoning.⁷⁶ In general, we can distinguish three categories that are important for determining one's legal status: Legally irrelevant interests—mere interests that have no legal protection; legally relevant interests—interests that are acknowledged by law; and subjective rights.

2. *Having a Legal Interest*

With this trichotomy in mind, the question of what it means to have an interest must be refined. To understand what the subjectivity of interest entails, we need to compare the concept of rights to the second category, the legally relevant interest or legal interest. This section explores the difference between having a legal interest and a legal right. Notably, not only is the status of the future child articulated in terms of interests—the “interests holder” makes an appearance in several other places in Dutch law.⁷⁷ In other legal systems the concept of interests holder is also no stranger, one example being Section 13.5 of the British Human Fertilisation and Embryology Act, which refers explicitly to the interests of the future child, or the “best interest” principle codified in Article 3 of the Convention on Rights of the Child.

The Dutch wrongful life case, also known as the *Baby Kelly* case, presents an interesting example to understand a legally relevant interest.⁷⁸ Here, the Dutch Supreme Court made an explicit distinction between a right and an interest. Namely, it declared that although the claimant did not have a right to her own non-existence, she did have an interest in her own non-existence, which was the legal basis for granting damages. The girl Kelly was born with a severe genetic condition. Had this condition been discovered during the pregnancy with

⁷⁴ See Nieuwenhuis, *supra* note 59, at 134.

⁷⁵ See Wiggers-Rust, *supra* note 65, at 38.

⁷⁶ See HR October 9, 1998, *NJ* 1998, 853 (Neth.) (*Jeffrey*).

⁷⁷ See Wiggers-Rust, *supra* note 65 (explaining the concept of interests in Dutch administrative and private law in general).

⁷⁸ See HR March 18, 2005, *NJ* 2006, 606 (Neth.) (*Baby Kelly*).

the help of a prenatal test, which the obstetrician considered unnecessary, Kelly's parents would have terminated the pregnancy and Kelly would never have been born. Consequently, Kelly claimed that she was harmed by the fact that she was born into a handicapped existence while she should not have been born at all, and in her name the hospital where her mother was treated was sued. In considering whether and in what way Kelly was harmed, the Dutch Supreme Court concluded that the hospital did not violate Kelly's rights, because she has no "right to her own abortion," for only the mother can decide whether or not to terminate a pregnancy.⁷⁹ Granting the child its own, independent right to non-existence would interfere with the mother's right and possibly result in children suing their own parents for being born into a disadvantaged position. Instead, the Court granted Kelly damages to be paid by the hospital because of the violation of her interest. Because the Court not only granted compensation for her handicaps, but for her whole existence, it is implied that Kelly had an interest—but not a right—in her own non-existence.⁸⁰

Even though Kelly did not have a right to her own non-existence, she did have legal standing as an interest-holder. After all, as an interest-holder, Kelly had a relevant claim now that her interest in non-existence had been interfered with, and she could therefore claim damages for the fact that she was born handicapped. As a result, as an interest-holder, Kelly became a legal subject.

To understand what it means to be the subject of legal interests, particularly in Dutch law, it is not enough to have a general definition of interests. It is important to understand that law explicitly recognizes some interests as relevant and others as not legally relevant, even though these are not necessarily translated into rights. Although Dutch law refers to interests and interest-holders at several points, little has been written about what it means to be the holder of a legally relevant interest and how this affects the interest-holder's legal status. Nevertheless, analysis of the little fragments we do have may give us some clue as to what the implications for the attribution of interests may be.

One of the places in which Dutch law refers explicitly to interests is in administrative law; the concept "interest holder"⁸¹ is an important notion in this field, because only the interest-holder can object against decisions from a public authority. According to legal theorist Bergamin, being a holder of an interest in administrative law means that one is a subject of

⁷⁹ See *id.* para. 4.13, 4.16. As a result of this, Dutch legal doctrine does not allow a child to bring a wrongful life claim against the parents. After all, Kelly's interest in non-existence depends on her mother intention to abort her if she had all the information. Without the mother's intention to abort Kelly, Kelly would not have an interest in her own existence.

⁸⁰ See Van Beers, *supra* note 21, at 317.

⁸¹ See "Belanghebbende," Art. 1:2 Awb.

administrative law.⁸² Only those with a relevant interest can participate in Dutch administrative law, and thus become an actor or subject. A similar construction exists in Dutch criminal procedural law: Interest-holders can file a complaint if the public prosecutor decides not to take a case to court.⁸³ An interest-holder can be the victim of a crime, but it can also be a third party.⁸⁴ Through this construction, the subject of an interest can, to a certain extent, participate in a criminal procedure. Put differently, the law opens up to the interest-holder. Interestingly, the law does not refer to these subjects as right-holders because it is the allocation of an interest that gives them legal standing, making them a subject in law—to the extent of that case or field of law.

Although the attribution or acknowledgement of interests creates some form of standing and therefore allows an entity to be a subject in law, it does not offer such a strong claim as having a right does.⁸⁵ Nieuwenhuis states that a right has a “mysterious preponderance” compared to an interest.⁸⁶ According to Bergamin, rights have a symbolic value due to their great argumentative value because they are a solid element of the law. In a legal dispute, arguments based on rights are usually considered stronger than arguments that do not appeal to rights.⁸⁷ Dutch authors are not the only ones who have noted this difference between rights and interests. Elliot likewise emphasizes the importance of rights when he says, “the pattern of rights determines not what it would be good to do or bad to do but what in the *strongest sense* must be done or must not be done.”⁸⁸ Dworkin also believes rights offer a special benefit as he uses the well-known metaphor, “rights as ‘trumps.’”⁸⁹ He says, “If someone has a right . . . this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did.”⁹⁰ Nevertheless, in Dutch legal doctrine, it is not clear why there is such a difference in weight. Once again, an explanation can be found in the interests theory of rights. Rights have such a strong position because they create actual legal duties, whereas “mere” interests do not. As Raz puts it,

⁸² See R.J.B. Bergamin, *De persoon in het recht* 44 (2000).

⁸³ See Art 12 Sv (Dutch Criminal Procedural Code).

⁸⁴ See G.J.M. Corstens, *Het Nederlandse strafprocesrecht* 520–21 (2005).

⁸⁵ See Wiggers-Rust, *supra* note 65, at 38–39.

⁸⁶ See Nieuwenhuis, *supra* note 59, at 29.

⁸⁷ See P.W. Brouwer et al., *Recht, een introductie* 303–04 (2004).

⁸⁸ R. Elliot, *The Rights of Future People*, 6 J. APPLIED PHIL. 159, 159 (1989) (emphasis supplied).

⁸⁹ See Ronald Dworkin, *Taking Rights Seriously* xi (1977); Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984).

⁹⁰ Dworkin, *supra* note 89, at 153.

Only where one's interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and, finally, only when the duty is for conduct which makes a significant difference for the promotion or the protection of that interests does the interest give rise to a right.⁹¹

Clearly, interest can be an important motivation to behave a certain way, or to endorse legal rules that protect these interests. Nonetheless, that does not mean that they constitute a duty to do so. Interests need to be balanced against other interests and can therefore more easily be overruled.⁹² Rights, on the contrary, do not only provide a reason to behave a certain way but, according to Raz, they constitute a duty to honor that specific right. Of course, rights are not absolute; for example, the European Convention on Human Rights shows that breaches of fundamental rights can be considered legitimate. Nevertheless, a legitimate breach needs to meet specific conditions defined in the convention, which makes it much more difficult to overrule a right. In sum, the concept of interests does offer some form of legal standing, and consequently legal protection, but the subject of interests can more easily be overruled because an interest does not have a corresponding duty, while a right does have such a duty. In a way, legally relevant interests can be understood as a "lite" version of rights.

3. Final Remarks on the Subject of Interests

The main advantage the subject of interests has over the subject of rights is that the former is a more flexible concept. The concept of interests is flexible in two ways. First, because interests do not have an immediate corresponding duty, law is not forced to respond in a certain way. Interests are easier to overrule than are rights because they do not have to offer the same strong position. To interfere with a right, one needs a strong justification. Therefore, offering legal protection through the subjectivity of interests puts less pressure on the law to respond a certain way. Second, the open concept of interests also adds to its flexibility. As discussed above, "interest" is a broader concept than "right," and for this reason, it can cover more aspects important to entities. Interests can also cover aspects that are not easily articulated into individual rights, such as societal or moral aspects.

Because the subjectivity of interests is a less defined and more open concept than legal personality, it does not have the problem of over inclusiveness, which played a role in the case of the unborn child and resulted in a restriction based on weak arguments. Because of its flexibility, the subjectivity of interests is preferable to the expansion of legal personality

⁹¹ Raz, *supra* note 60, at 183.

⁹² See Nieuwenhuis, *supra* note 59, at 42.

to offer non-human entities legal protection. Especially in the case of protecting the unborn child from maternal harm, the subjectivity of interests offers extra benefits. Considering the fact that excessive drinking and drug abuse have an even larger impact in the first stages of the fetus's development, the need for protection is most urgent in the case of the early, non-viable fetus. This makes it undesirable to restrict legal protection to only independently viable fetuses. Whereas the expansion of legal personality may cause a clash between the rights of the unborn child and the rights of the mother, and the stronger legal status of the unborn child may have unwanted consequences for other fields of law, the subjectivity of interests can avoid these problems. Because an interest does not create a legal duty, different interests can be balanced against each other, offering the legislator more freedom in responding to these interests.

The subjectivity of interests may also face some challenges. For example, it can be argued that this flexibility also has a downside. The concept is rather complex because of its openness: It can be said that anything could be in the interest of the future child. Particularly in those cases in which the interests of the entity are determined by third parties and not the entity itself, a large number of interests can be attributed to an entity. As a result, law needs to address these different interests. The most interesting challenge, however, pertains to the subject itself. It is a common notion that not everything can have interests; for example, we can take interest in a car, a house, or art, but these lifeless things themselves have no interests of their own. Therefore, we must ask ourselves the question of whether the future child can have interests before we can apply this strategy to offer this entity legal protection.

III. The Capacity to Have Interests

With regard to legal protection of the future child, not only is it important to understand what the subjectivity of interest implies for the future child's legal status, but one must also ask whether the future child can be the subject of legally relevant interests. Little has been written in Dutch legal doctrine on who can be the subject of interests. Nieuwenhuis argues that future generations can have interests—and that in their case, he thinks it is preferable to use the vocabulary of interest instead of rights.⁹³ Wiggers-Rust states that entities that have no legal personality can also have legally relevant interests.⁹⁴ Regarding the future child, it seems that Dutch law follows this reasoning and simply assumes that the future child can have interests without further objection. This approach, however, does not consider a key characteristic of this entity; the future child is treated as an existent and a non-existent

⁹³ See *id.* at 134.

⁹⁴ See Wiggers-Rust, *supra* note 65, at 21, 49.

entity at the same time.⁹⁵ To understand whether the future child can have interests, we must further elaborate on the subjectivity of interests and answer the question: Which entities can have interests? Addressing this question from a legal-philosophical angle shows that the assumption of the future child's interests is not as self-evident as has been presented. The following section explores the account of various philosophers on the requirements for interests. These accounts share a common thread in that they connect this capacity to a conscious existence or a future conscious existence. The distinction between potential and actual people is of particular importance for this account.

1. *Interests and Existence*

It is a quite common notion that not all entities are capable of having interests. For example, Feinberg, McCloskey, and Dworkin have stated that mere things cannot have interest.⁹⁶ According to Feinberg, interests spring from desires, wishes, and hopes, and consequently, the ability to have interests presupposes "cognitive awareness."⁹⁷ Warren uses "sentience" as the defining criterion. "A being that lacks the capacity to have experiences, and/or to prefer some experiences to others, cannot coherently be said to have moral rights, because it has no interests to be respected."⁹⁸ Dworkin uses the term consciousness, which he defines as "some mental as well as physical life."⁹⁹ Although there might be some minor differences between the proposed criteria, what they have in common is that the ability to have interests presupposes awareness to feel pain or to have preferences, or as Feinberg puts it, "conative life."¹⁰⁰ Of course, it is evident that the future child does not meet these requirements; it lacks not only the capacity to feel or think or form preferences, but it is not even a form of life. If we follow these criteria strictly, the future child could never be the subject of interests.

If "conative life" were indeed a strict criterion for having interests, it would imply that we, as present beings, would never consider the interests of future entities. As a result, not only the future child, but also future generations and embryos would be irrelevant for our normative thinking. It is, nonetheless, not that controversial to assume that we do have some obligations towards our future descendants. After all, our actions in the present can

⁹⁵ See Lisette ten Haaf, *Future Persons and Legal Persons: The Problematic Representation of the Future Child in the Regulation of Reproduction*, 5 LAWS 10 (2016).

⁹⁶ See Feinberg, *supra* note 60, at 52; Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* 16 (1993); McCloskey, *supra* note 60, at 126.

⁹⁷ See Feinberg, *supra* note 60, at 52.

⁹⁸ M.A. Warren, *Do Potential People Have Moral Rights?*, 7 CAN. J. PHIL. 275, 283 (1977).

⁹⁹ Dworkin, *supra* note 96, at 16.

¹⁰⁰ See Feinberg, *supra* note 60, at 49.

have a large impact, both negatively and positively, on their lives.¹⁰¹ Although the identity of those who will exist in the future is unknown, it is reasonable to assume that once they exist, they will meet the requirements for having interests. Therefore, knowing that in the future, entities will exist that are capable of having interests and will have interests in, for example, a clean environment and a stable economy, people in the present arguably have at least a moral obligation to take these future interests into account.

2. *Actual and Potential*

Importantly, according to the theory of conative life, whether an entity—be it an embryo, a future generation, or a future child—will have interests depends on whether it will come into existence in the first place. For this reason, a distinction must be made between actual future people and merely potential future people.¹⁰² Actual future people, on the one hand, are those who, in the normal course of events, will come into existence one day. For this reason, their interests should be taken into account. Merely potential future people, on the other hand, are those who hypothetically could have come into existence, but will not, because their parents did not procreate at the right time, or with the right person, or both. Because a merely potential person will never come into existence, that potential person will never have the ability to have interests. Consequently, there will never be future interests of this entity that we can anticipate. For this reason, as Dworkin points out, smoking during the pregnancy is more harmful than abortion from the perspective of the child—in the case of smoking, a child will be born whose interests are violated, while in the case of abortion, there will be no child and therefore no subject of interests.¹⁰³ In short, only the interests of future entities that will come into existence—or of who we at least can expect they will most likely come into existence—need to be taken into account.

This exception seems to offer little solace for the future child with an assumed interest in non-existence. After all, due to interference, the future child will not come into existence. Importantly, the future child in this case is not just a merely potential person. It is not just one of the many options that could have been realized, had its prospective parents procreated at the right time. It is not just a possibility that would have come into existence had another child not been born. Initially, the future child starts as an actual future person. Its prospective parents intend to bring it into existence, and without interference, it can be assumed that it would have come into existence, and probably have suffered from the poor living conditions it would have been born into in this scenario. The fact that it initially is an

¹⁰¹ See Warren, *supra* note 98, at 159; Feinberg, *supra* note 60, at 64.

¹⁰² This distinction is made among others. See C. Hare, *Voices from Another World: Must we Respect the Interests of People who Do Not, and Will Never, Exist?*, 117 *ETHICS* 498, 498 (2007); Dworkin, *supra* note 96, at 19; A.J. Karnein, *A Theory of Unborn Life: From Abortion to Genetic Manipulation* 28 (2012); Warren, *supra* note 98, at 288–89; Feinberg, *supra* note 60, at 63.

¹⁰³ See Dworkin, *supra* note 96, at 19.

actual person is the exact reason why there is a need for protection and why its interests are taken into account. If we do not prevent the child's conception, it is likely to be harmed because of the poor conditions under which it comes into existence. Yet, because the harm to the future child is inherent to its conception, taking its interests into account and protecting it from harm implies the prevention of its existence. This means that the future child will never come into existence, so it would become a merely potential person. Nonetheless, the future child also cannot be seen as merely a potential person. After all, because the interests of the future child are seen as the only reason preventing its existence, then, without another justification, ignoring the future child's interests means that the child will come into existence. Consequently, its future existence would mean that the future child's interests are relevant. As a result, a strange loop is created—by interfering and consequently preventing the future child from coming into existence, the future child enters the domain of merely potential people. This would imply that its interests cannot serve as a justification, as the justification for interference disappears. Consequently, the future child's existence is not prevented, and so it enters the domain of actual future people. As an actual person, it faces an actual risk of being harmed, and anticipating this risk starts the loop all over again. In short, the future child does not fall into one of these categories, but flows between them. Put differently, the actual-potential distinction cannot be applied to the future child in a way that offers a solid answer to the question of whether law can appeal to the interests of the future child to justify the prevention of its existence.

IV. Final Remarks on the Future Child

Although the vocabulary of interests seems to evade some of the problems of the expansion of legal personality, it does not offer a clear and solid justification for the legal protection of the future child. The main problem is that the legal protection of the future child fundamentally differs from the legal protection of other future entities. Because the risk for harm is inherently connected with the future child's conception, preventing the risk implies preventing the subject who runs the risk. Using conative life as a criterion for having interests and distinguishing between potential and actual future persons seems to be unable to capture this entity because of its hybrid status. To conclude, although the subject of interests may be a useful concept to represent several non-human entities within law, it does not seem to offer the same benefit for the future child.

D. Conclusion

Increasing possibilities of influencing and controlling human reproduction have made future life an urgent topic for legal thinking. Now that having children has become a matter of choice rather than chance, we have to take responsibility for our reproductive choices. This means that we cannot ignore the unborn and future child together with the fact that we already can estimate the possible harm they face. As Savulescu has pointed out, the

knowledge we gain on biotechnology and reproduction comes with an imperative to act.¹⁰⁴ Nevertheless, if we want to develop legal measures that can protect these entities from harm, these entities need to be somehow incorporated into the legal system. The question is: How should this incorporation be framed?

Because the unborn and future child are rather new entities, law has to be creative in addressing these entities. Two examples of this creativity can be identified in the Dutch legal system, as it employs two different strategies to respond to this call. What these strategies have in common is that they are both subject-oriented; both strategies seek the justification for interference in the rights or interests of an individual subject—the unborn child and future child respectively. The first strategy is the expansion of legal personality by including these entities in existing categories, as is done in case of the unborn child. Importantly, with regard to the unborn child, this strategy faces the risk of becoming over inclusive; it would not only protect the fetus in the final stages of its development, but also the embryo in its earlier stage. Judges have attempted to prevent unwanted consequences of too much expansion by distinguishing between the viable and the non-viable fetus; only the viable fetus qualifies for this form of legal protection. Although the attempt to set some boundaries is understandable, the legal reasoning behind it is not convincing. It gives the impression that only the viable fetus is worthy of protection and that the *nasciturus* fiction can only be applied to the viable fetus.

The second strategy, treating these entities as subjects of legally relevant interests, may be a better solution. Because “interest” is a broader concept than “right” and because it does not create immediate duties, treating an entity as a subject of interests offers law more flexibility to respond than attributing legal personality. As interests do not offer the same strong position as rights do, they can be overruled more easily and set aside when other interests or rights prevail. For this reason, there is less risk of unwanted overinclusion and unwanted consequences; protecting the unborn child as a subject of interests rather than a legal person, similarly in the stadium before viability, is less likely to clash with abortion legislation.

Yet, although the concept of a subject of interests may be a useful tool to offer legal protection to non-human entities such as unborn children, animals, and future generations, it is still unclear how this strategy can be used to protect the future child from harm. The fact that legal protection affects the core of the future child’s existence rather than the circumstances under which it could come into existence, poses an important complication for the attribution of interests. Considering conative life as the requirement fails to solve this complication. This theory distinguishes between actual future people, who come into existence and have conative life, and merely potential people, who will never come into

¹⁰⁴ See J. Savulescu, *Future People, Involuntary Medical Treatment in Pregnancy and the Duty of Easy Rescue*, 19 UTILITAS 1, 18 (2007).

existence. The future child, however, seems to escape this distinction as it transcends this dichotomy. So, although the conative life-account provides useful insights and helps us to better understand the problematic nature of the future child, it also raises more questions to be answered in order to determine whether this theory can be applied to the future child. More importantly, now that both strategies remain problematic, and considering the appeal to the future child's interests has been highly criticized in the non-identity problem debate,¹⁰⁵ we are confronted with a more fundamental question: Should we keep trying to justify regulation of reproduction and selection by appealing to the unborn or future child's subjective interests?

¹⁰⁵ See *supra* notes 56 and 58.

